SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2902-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEWIS J. ENGLISH, a/k/a
LEWIS ENGLISH, JR. and
LOUIS ENGLISH,

Defendant-Appellant.

Submitted November 30, 2016 – Decided January 23, 2017

Before Judges Fuentes and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-09-2799.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Assistant Deputy Public Defender, of counsel and on the brief).

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Patrick D. Isbill, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A grand jury indicted defendant Lewis J. English for fourth-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(3) (count one); third-degree possession with intent to distribute a CDS, N.J.S.A. 2C:35-5(b)(11) (count two); and third-degree possession with intent to distribute a CDS within 1000 feet of school property, N.J.S.A. 2C:35-7 (count three). The charges stemmed from defendant's alleged possession of fifty-two bags of marijuana found in a nearby stash location and sale of four bags of marijuana to an undercover police officer. Forensic evidence confirmed that the marijuana found in the fifty-two bag weighed 55.51 grams, or 1.95 ounces, and the marijuana found in the four bags weighed 5.384 grams, or less than one-fifth of an ounce.

The jury found defendant not guilty of the charges based on the fifty-two bags of marijuana, but guilty on count one of the lesser-included offense of possession of the four bags of marijuana, a disorderly person's offense, and on count two of the lesser-included offense of fourth-degree possession with intent to distribute a CDS. The jury also found defendant guilty on count three. The trial judge granted the State's motion for a mandatory extended-term sentence pursuant to N.J.S.A. 2C:43-6(f).

After merging counts one and two with count three, the judge sentenced defendant on count three to an eight-year term of imprisonment with a four-year period of parole ineligibility.

On appeal, defendant raises the following contentions:

POINT I

> PERMITTING SGT. RIVERA TO TESTIFY ABOUT HIS OPINION INVADED THE FACT-FINDING PROVINCE OF THE JURY AND REVERSAL IS REQUIRED. (Not Raised Below).

POINT II

> THE TRIAL COURT IMPOSED AN EXCESSIVE SENTENCE AND FAILED TO MAKE PROPER FACTUAL FINDINGS TO SUPPORT A PAROLE INELIGIBILITY PERIOD IN EXCESS OF THE MANDATORY MINIMUM PERIOD.

We affirm defendant's conviction, but remand for reconsideration of his sentence.

I.

Detective Sean Miller of the Camden County Police Department testified at trial that he was involved in an undercover "buy-bust" narcotics operation in Camden on March 16, 2012. He drove to the corner of Lewis and Chase Streets, exited his unmarked patrol car, approached an individual named Kasime Lewis, and asked for marijuana. Lewis led him to the porch of a house where people were eating outside, and then said something to defendant. As defendant walked up the porch, Detective Miller asked him for four $5 bags of marijuana. Defendant lifted a window on the porch,

reached in, retrieved four bags of marijuana, and sold them to the detective for $20. Detective Miller gave defendant a $20 bill that had been previously marked, recorded, and photocopied. The sale occurred within 1000 feet of an elementary school. Detective Miller then returned to his unmarked patrol car and radioed a description of defendant to the arrest unit. He identified defendant following defendant's arrest.

Sergeant Felix Rivera of the Camden County Police Department testified that he arrested defendant within minutes of the transaction, searched defendant, and found one $5 bill, five $1 bills, and the $20 bill that had been previously marked and photocopied. He also testified that having only $30 was still consistent with street level narcotics dealing.

II.

Defendant contends for the first time on appeal in Point I that Sergeant Rivera's testimony constituted inadmissible lay opinion testimony that usurped the jury's function to determine his guilt. Because defendant did not raise this issue before the trial court, we review it for plain error. R. 2:10-2; State v. Macon, 57 N.J. 325, 336 (1971). We will reverse on the basis of an unchallenged error only if it was "clearly capable of producing an unjust result." Macon, supra, 57 N.J. at 337 (citations omitted). To reverse for plain error, we must determine that

there is a real possibility that the error led to an unjust result, that is, "one sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached." Id. at 336.

"Lay witnesses may present relevant opinion testimony in accordance with [N.J.R.E.] 701, which permits testimony in the form of opinions or inferences . . . if it . . . is rationally based on the witness' perception and will assist in understanding the witness' testimony or in determining a fact in issue. State v. Lazo, 209 N.J. 9, 22 (2012) (quoting N.J.R.E. 701). In State v. McLean, 205 N.J. 438 (2011), the Court described the boundary line that separates factual testimony by police officers from permissible expert opinion testimony as follows:

> On one side of that line is fact testimony, through which an officer is permitted to set forth what he or she perceived through one or more of the senses. Fact testimony has always consisted of a description of what the officer did and saw, including, for example, that defendant stood on a corner, engaged in a brief conversation, looked around, reached into a bag, handed another person an item, accepted paper currency in exchange, threw the bag aside as the officer approached, and that the officer found drugs in the bag. Testimony of that type includes no opinion, lay or expert, and does not convey information about what the officer "believed," "thought" or "suspected," but instead is an ordinary fact-based recitation by a witness with first-hand knowledge.

[Id. at 460 (citations omitted).]

The Court explicitly rejected the argument "that there is a category of testimony that lies between [expert and lay opinions] that authorizes a police officer, after giving a factual recitation, to testify about a belief that the transaction he or she saw was a narcotics sale." Id. at 461. The Court reasoned that such an approach would "transform[] testimony about an individual's observations of a series of events . . . into an opportunity for police officers to offer opinions on defendants' guilt." Ibid.

The Court's explanation of why the testimony in McLean was impermissible has no resonance here. Sergeant Rivera's testimony was not dispositive of whether defendant was guilty of possession with intent to distribute a CDS, nor did he testify as to the ultimate issue of whether defendant committed the offense. Unlike the police officer in McLean, Sergeant Rivera was not asked for his conclusion or observation about the nature of the transaction, nor did he express a belief regarding defendant's guilt. Rather, he testified that he was the arresting officer who searched defendant following the arrest and found $30, which included the marked $20 bill Detective Miller used to purchase the four bags of marijuana.

More importantly, Sergeant Rivera's testimony did not lead the jury to reach a result it would not have otherwise reached without it when considering the overwhelming proofs that defendant possessed a CDS with intent to distribute. Defendant sold four bags of marijuana to an undercover police officer within 1000 feet of school property; he was arrested within minutes of the drug transaction; and the marked $20 bill was found on his person. Accordingly, there was no error, let alone plain error, in Sergeant Rivera's testimony.

III.

Defendant challenges his sentence in Point II. The judge found defendant was eligible for a mandatory extended-term sentence pursuant to N.J.S.A. 2C:43-6(f) based on his prior convictions for possession with intent to distribute a CDS. The judge then found and applied aggravating factors N.J.S.A. 2C:44-1(a)(3), (6) and (9) based on defendant's prior convictions for non-drug-related offenses, and mitigating factor N.J.S.A. 2C:44-1(b)(4) based on defendant's drug usage. The judge then determined as follows:

> [A]t this time and weighing the aggravating and mitigating factors on a qualitative as well as quantitative basis, the [c]ourt finds that the aggravating factors clearly, convincingly and substantially outweigh the mitigating factors whereupon the base term will be set above the presumptive term and a

> period of parole ineligibility is imposed. I would note that the presumptive term for a third-degree is seven years, N.J.S.A. [2C:]44-1[(f)].[1]

The judge imposed an eight-year term of imprisonment with a four-year period of parole ineligibility.

Defendant concedes he was eligible for a mandatory extended-term sentence of a maximum of ten years for his conviction for third-degree possession with intent to distribute a CDS within 1,000 feet of school property. However, he argues there were no facts justifying a top number of eight years even in the extended range, which amounts to two year's imprisonment for each $5 bag of marijuana and is excessive. Defendant also argues that the sentencing judge erred in imposing a maximum period of parole ineligibility of four years without a full and proper explanation.

We review a judge's sentencing decision under an abuse of discretion standard. State v. Fuentes, 217 N.J. 57, 70 (2014). As directed by the Court, we must determine whether:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) the application of the guidelines to the facts of [the] case makes

[1] The Supreme Court eliminated presumptive sentences eleven years ago in State v. Natale, 184 N.J. 458, 466 (2005) in response to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2513, 159 L. Ed. 2d 403 (2004).

> the sentence clearly unreasonable so as to shock the judicial conscience.
>
> [Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

We must (1) "require that an exercise of discretion be based upon findings of fact that are grounded in competent, reasonably credible evidence[;]" (2) "require that the factfinder apply correct legal principles in exercising its discretion[;]" and (3) modify sentences only "when the application of the facts to the law is such a clear error of judgment that it shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363-64 (1984).

Defendant was convicted of third-degree possession with intent to distribute a CDS within 1000 feet of school property. He was sentenced to an extended-term sentence pursuant to N.J.S.A. 2C:43-6(f), which provides as follows, in pertinent part

> A person convicted of . . . possessing with intent to distribute any dangerous substance or controlled substance analog under [N.J.S.A.] 2C:35-5 . . . who has been previously convicted of . . . possessing with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by [N.J.S.A. 2C:43-7(c)], notwithstanding that extended terms are ordinarily discretionary with the court. The term of imprisonment shall, except as may be provided in [N.J.S.A.] 2C:35-12, include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed

> by the court or three years, whichever is greater, not less than seven years if the person is convicted of a violation of [N.J.S.A.] 2C:35-6, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.
>
> [(Emphasis added).]

N.J.S.A. 2C:43-7(c) provides as follows, in pertinent part, "[i]n the case of a person sentenced to an extended term pursuant to . . . [N.J.S.A. 2C:43-6(f)] . . . the court shall impose a sentence within the ranges permitted by [N.J.S.A. 2C:43-7 (a)(2), (3), (4) or (5)] according to the degree or nature of the crime for which the defendant is being sentenced[.]" N.J.S.A. 2C:43-7(a)(4) provides, in pertinent part, that "a person who has been convicted of a crime shall be sentenced, to an extended term of imprisonment as follows: . . . [i]n the case of a crime if the third degree, for a term which shall be fixed by the court between five and [ten] years."

The Legislature did not carve out any exception in these statutes for marijuana offenses. Accordingly, a defendant sentenced to an extended-term pursuant to N.J.S.A. 2C:43-6(f) may be sentenced for a third-degree crime to a term of between five and ten years with a period of parole ineligibility of one-third and one-half of the sentence imposed, or three years, whichever is greater.

We discern no error in the judge's findings of aggravating and mitigating factors. In addition, we acknowledge that defendant has a lengthy criminal history, which includes several prior drug-related convictions. However, the offense in this case for which defendant was convicted involved the sale of only four bags of marijuana weighing less than one-fifth of an ounce. An eight-year sentence for such a small amount of marijuana, therefore, is facially excessive. Accordingly, we remand for reconsideration of defendant's sentence and imposition of a period of parole ineligibility fixed at, or between, one-third and one-half of the sentence imposed on remand, or three years, whichever is greater.

Defendant's conviction is affirmed. The matter is remanded for reconsideration of defendant's sentence. We do not retain jurisdiction.